BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEFFREY S. GRETHER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,021,710
COX COMMUNICATIONS	)	
Respondent	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Both claimant and respondent appeal the July 7, 2006 Award of Administrative Law Judge John D. Clark. Claimant was awarded benefits for a .05 percent functional disability, followed by a 50 percent permanent partial general work disability for the injuries suffered on May 13, 2004. The Workers Compensation Board (Board) heard oral argument on September 20, 2006.

APPEARANCES

Claimant appeared by his attorney, Alexander B. Mitchell, II, of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Jeffery R. Brewer of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). Additionally, at oral argument to the Board, the parties stipulated that the 5 percent permanent partial disability based upon claimant's functional impairment was proper for purposes of this litigation. The parties also stipulated that while the ALJ awarded a 5 percent permanent disability in the Award, in the computation section of the Award, the ALJ actually used a .05 percent impairment. This error in calculations will be corrected in the Board's final Order.

ISSUES

What is the nature and extent of claimant's disability? Respondent argues that claimant failed to put forth a good faith effort to retain his employment with respondent and a wage should be imputed. Respondent also argues the zero percent task loss opinion of Paul S. Stein, M.D., is the most accurate and the ALJ's use of that task loss in computing claimant's permanent disability should be affirmed. Claimant argues that he did put forth a good faith effort to retain his job with respondent, but was laid off due to the pain medication he was using as a result of the accident. Therefore, claimant contends a 100 percent wage loss is appropriate in this situation. Claimant also argues the 57 percent task loss opinion of Pedro A. Murati, M.D., is the most accurate and should be adopted by the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed, although with the correction in calculations discussed above.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions insofar as they do not contradict the findings and conclusions contained herein.

On May 13, 2004, while carrying a voice port, claimant fell down some stairs on respondent's premises. This accident and the resulting injury were immediately reported to claimant's supervisor, Calvin Hilt. Mr. Hilt had actually heard claimant fall and had come out to inquire if claimant was all right. Claimant told Mr. Hilt that he was okay, but that his back hurt. Claimant continued working for respondent for a week. But on the next Thursday, claimant woke up with his back having "froze up" on him.[1] At that time (May 20, 2004), claimant went to the emergency room at Via Christi Regional Medical Center. Before going to the emergency room, claimant called his supervisor at that time, Scott Knoll. Claimant was directed to call respondent's human resources representative, Julie Ford, which he did after the trip to the emergency room.

Ms. Ford told claimant to meet her at the Wichita Clinic, where he was asked to provide a urine sample, which he did. After passing the urine test, claimant was referred to Merrill A. Thomas, D.O., at the Wichita Clinic in its Occupational Health Services section. Dr. Merrill first saw claimant on May 25, 2004, at which time Dr. Merrill diagnosed a

[1] R.H. Trans. at 8.

thoracic sprain. Claimant was referred to Rodney L. Jones, M.D., for epidural and steroid injections, which claimant testified did not help.

Claimant was then referred to board certified neurological surgeon Eustaquio Abay, M.D. Dr. Abay saw claimant on two occasions, September 30, 2004, and December 7, 2004. He found claimant to have mild tenderness in the lower neck and thoracic area, but with no definite focal deficit or lateralizing sign. Claimant was returned to light duty and restricted from lifting more than 30 pounds occasionally. He was also to avoid repetitive or frequent lifting, pushing or pulling beyond 5 to 10 pounds. Dr Abay saw claimant a second (and last) time on December 7, 2004, at which time claimant's pain persisted. Claimant's temporary restrictions continued. At the time of claimant's last visit with Dr. Abay, claimant was not at maximum medical improvement.

Claimant was referred to board certified neurological surgeon Paul S. Stein, M.D., at the request of respondent. Dr Stein examined claimant on February 21, 2005. He diagnosed claimant with a soft tissue injury, and he recommended claimant return to work without permanent restrictions. After reviewing a task list prepared by vocational expert Jerry Hardin, Dr. Stein opined that claimant was not restricted from performing any of the tasks on the list. He acknowledged that if claimant continued to have difficulty, claimant may require restrictions in the future.

Claimant was returned to work on July 18, 2005, and worked light duty for a period of two weeks and three days. On August 3, 2005, he was terminated due to his inability to drive company vehicles due to the pain medication he was then using. Claimant applied for and began receiving unemployment benefits. Claimant applied at two to three places per week while receiving unemployment. Claimant also testified to the efforts he expended while trying to find a job, including applying with respondent for any job within his restrictions. Respondent did not hire claimant.

Claimant was referred to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an examination at claimant's attorney's request. That examination, on August 9, 2005, resulted in Dr. Murati recommending restrictions which included no lifting over 35 pounds, no frequent lifting over 20 pounds, and no work over 24 inches from claimant's body, with no twisting of claimant's trunk. After reviewing Mr. Hardin's task list, Dr. Murati found claimant to have suffered a 57 percent task loss.

In workers compensation litigation, it is the claimant's burden to prove his/her entitlement to benefits by a preponderance of the credible evidence.[2]

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[2] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

It is not disputed that claimant suffered an accidental injury arising out of and in the course of his employment. The dispute herein centers around what, if any, permanent partial general disability claimant has suffered as a result of that accident.

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[4]

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[5] and *Copeland*.[6] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[7]

Here, respondent argues that claimant did not put forth a good faith effort to retain his employment with respondent. Respondent argues in its brief that claimant

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[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 44-510e.

[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] *Id.* at 320.

should not be granted a 100 percent wage loss because "the employer was able to accommodate except for claimant's continued use of pain medications."[8] What respondent fails to acknowledge is that claimant was placed on that pain medication by respondent's chosen authorized physician as a direct result of claimant's work-related injury suffered while working for respondent. Respondent's argument in this regard is disingenuous. The ALJ found that claimant had put forth a good faith effort to find employment after his termination. The Board agrees and finds claimant has suffered a 100 percent wage loss as a result of these injuries.

With regard to the task loss suffered here, the ALJ found Dr. Stein's opinion to be the most credible. The Board also agrees with this assessment. In averaging the 100 percent wage loss and the zero percent task loss, the Board affirms the award for a 50 percent permanent partial general disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Workers Compensation Board that the Award of Administrative Law Judge John D. Clark dated July 7, 2006, should be, and is hereby, affirmed, although with the calculation correction noted above. Claimant is granted an award against the respondent, Cox Communications, and its insurance carrier, American Home Assurance Company, for an accidental injury which occurred on May 13, 2004, and based upon an average weekly wage of $878.49.

Claimant is entitled to 38 weeks of temporary total disability compensation at the rate of $440 per week totaling $16,720, followed by 19.60 weeks of permanent partial disability compensation at the rate of $440 per week totaling $8,624 for a 5 percent permanent partial disability, followed thereafter by permanent partial disability compensation at the rate of $440 per week for a 50 percent work disability as of August 4, 2005, for a total not to exceed $100,000.

As of October 10, 2006, there is due and owing claimant 38 weeks of temporary total disability compensation at the rate of $440 per week totaling $16,720, followed by 43.59 weeks of permanent partial disability compensation at the rate of $440 per week totaling $19,179.60, for a total of $35,899.60, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $64,100.40 is to be paid at the rate of $440 per week until fully paid or further order of the Director.

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[8] Respondent's Brief at 2 (filed Aug. 10, 2006).

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

IT IS SO ORDERED.

Dated this ____ day of October, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Alexander B. Mitchell, II, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge